IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 436 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

YAKEEN AHMED ABDUL MAJIDKHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 436 of 2003

MR MH DAYAMAKUMAR for Petitioner No. 1

Mr. A.D. Oza, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 23/01/2003

ORAL JUDGEMENT

Few observations made by the apex court in case of Chairman, Railway Board v. Chandrima Das, reported in

AIR 2000 page 988, as regards the rights enshrined under Part III of the Constitution of India are relevant and material in the peculiar facts and circumstances of the present case. They are, therefore, reproduced as under:

"36. The rights guaranteed under Part III of the Constitution are not absolute in terms. They are subject to reasonable restrictions and, therefore, in case of non citizen also, those Rights will be available subject to such restrictions as may be imposed in the interest of the security of the State or other important considerations. Interest of the Nation and security of the State is supreme. Since 1948 when the Universal Declaration was adopted till this day, there have been many changes political, social and economic while terrorism has disturbed the global scenario. Primacy of the interest of Nation and the security of State will have to be read into the Universal Declaration as also in every Article dealing with Fundamental Rights, including Art. 21 of the Indian Constitution."

Heard learned advocate MR MH DAYAMAKUMAR for Petitioner and the learned PP Mr. AD Oza for the respondent State. Present application is filed by the petitioner for bail under section 439 of the Code of Criminal Procedure. The petitioner has challenged the order passed by the learned Additional Sessions Judge, Court No. 9, City Sessions Court, Ahmedabad dated 13th January, 2003 in Criminal Misc. application No. 88 of 2003 and has also prayed for granting bail in favour of the present petitioner.

2. Learned advocate Mr. MH DAYAMAKUMAR for Petitioner has submitted that a very long FIR has been filed by the prosecution and while reading the FIR, it contains the only statement of Samirkhan Sarfarazkhan Pathan of Ahmedabad who subsequently died in an encounter. He also submitted that the whole FIR is based upon the statement of accused No. 7 Samirkhan Sarfarazkhan Pathan and the petitioner is not involved in the FIR at all in the charge sheet. However, the petitioner was shown to be accused no.1 in the charge sheet. He also submitted that in entire incident, Samirkhan Sarfarazkhan is the central figure and that is why he met with his fate. He submitted that the petitioner is belonging to Rajasthan State, District Kota, Village Suket having his own mines license. He also submitted that in the petitioner's stone mine, various labourers are working. He also submitted that

the accused No. 7 Samirkhan Sarfarazkhan Pathan committed murder of police constable on 12th May, 1996 and, thereafter, it was alleged that he was absconding but the absconding part has not been notified by the police authority. He also submitted that the police authority has taken the base of one statement given by Gulalamkhan Ibrahimkhan on 10th December, 2002; his brother in law who is also accused no. 11 in this case. He is also belonging to Rajasthan. His name is Badrealamkhan Inamullakhan Pathan. He submitted that the said statement may be considered to be hear say evidence against the petitioner. He also submitted that Badrealamkhan Pathan came in Ahmedabad in the year 2001 because of the disputes between the wife and the husband. Gulalamkhan made arrangement for Samirkhan in Madhya Pradesh and Samirkhan was not able to get job at Madhya Pradesh. Thereafter, he was sent to Rajasthan. He also submitted that the charge sheet has also been filed against the petitioner and the petitioner has received the same. He also raised a contention that the statement dated 16th December, 2002 of Gulalamkhan Pathan is not admissible in evidence; even the statement of Samirkhan is also not admissible in evidence because it was a statement of the co-accused further submitted that except these two statements which are considered as evidence against the petitioner which are not admissible in evidence, there is nothing against the petitioner involving him in the alleged incident. He also submitted that while deciding the bail application, whether the prima facie case has been established or not is the only question which is required to be examined by the Court. He also submitted that looking to these facts, there is no prima facie case find out against the petitioner. He has relied upon the decision of this Court in case of SC Verma versus State of Gujarat reported in 2001 (2) GLR 1029. He has also relied upon the decision of the apex court in case of SN Thapa, Additional Collector, Marine & Preventive, Bombay versus State of Maharashtra, reported in 1994 (2) UJ (SC) 369. He also submitted that there is no direct evidence and no prima facie case has been proved against the petitioner and, therefore, in such circumstances, personal liberty being the fundamental right may be taken into account while considering the bail. He also submitted that there is no past incident against the petitioner. He also submitted that in case of clear past of the accused, even though prima facie case has been established against the accused, in that circumstance also, the court has granted the bail and, therefore, he submitted that in this case, the trial court has committed error in rejecting the bail application and therefore, the petitioner is entitled to

be released on bail.

On the other hand, learned Public Prosecutor Shri A.D. Oza appearing for the State has submitted that the trial court has considered the statement which is, admittedly, not the statement of co-accused, being the extra judicial statement dated 16th December, 2002. According to him, statement dated 16th December, 2002 is clearly establishing the prima facie involvement and participation of the petitioner and, therefore, the trial court was right in relying upon the said statement dated 16th December, 2002 and was also right in rejecting the application for bail. He also submitted that the petitioner is belonging to the State of Rajasthan, out side the State of Gujarat and he is involved in the serious offence and there is prima facie case against the petitioner and, therefore, present bail application is required to be rejected.

I have considered the submissions made by the learned advocates for the parties. Before passing the orders, it was pointed out to MR MH DAYAMAKUMAR for Petitioner as to whether he would be inviting reasoned order or not. He requested that the Court may pass appropriate reasoned orders and, therefore, this court is passing these orders, prima facie, by taking into consideration the merits of the matter only for the purpose of deciding the present bail application. This Court is well aware about the principles of law settled by the apex court which are to the effect that while deciding an application for bail, the Court cannot decide the merits or demerits of the matter but the court can consider whether prima facie case has been made out against the petitioner or not on the basis of the material on record.

While keeping these principles in mind, looking to the facts on record, an offence has been registered in DCB I-CR No. 23 of 2003 for the alleged offence under section 120B, 121, 121(a), 122, 197, 198, 212, 216, 419, 465, 468, 471 and 511 of the Indian Penal Code and section 10 and 12 of the Passport Act. I have perused the order passed by the trial court. I have also considered the submissions made by the learned advocates for the parties before the trial court. The trial court has observed in its order that the complaint given by the PI HP Agravat of DCB Crime is based upon the statement of Samirkhan Pathan (since deceased) for the alleged offence from the date 10.5.1996 to 30.9.2002; the charge sheet in the matter is already filed on date 27.12.2002 and in the mean time, Samirkhan Pathan has passed away in an

encounter; it is also rightly pointed out that the complaint filed for fictitious and bogus passport against said Samirkhan at Bhopal, the name and role of the present applicant (petitioner) does not figure; he has no past criminal antecedent and it also appears from the documents that he is a trader in the State of Rajasthan having his own mines. The trial court has also observed that it is also a fact that the statement dated 16.12.2002 involving the present accused with the crime is recorded subsequent to his arrest and encounter of Samirkhan; as Samirkhan worked in the mine of the present petitioner for one and half years, as rightly pointed out, in ordinary course, he would be alleged for the offence under section 212 of the IPC for harbouring an offender but in this case, it is not so simple as attempted to be made out; each accused is alleged to have entered into the conspiracy for sedition and other serious offence punishable with severe punishment and as there could not be any direct evidence of conspiracy which even at the time of trial needs to be inferred from the facts and circumstances, it would be premature to hold at this juncture that the accused has no connection with the commission of crime as alleged. As regards extra judicial confession, it has been observed by the trial court that an extra judicial confession which appears to have been given as per the statement of one of the witnesses can be used against the accused and since this is not the right stage for appreciation of evidence, the court cannot exercise its discretion to enlarge the accused on bail; with the severe punishment, there is always a possibility of a person evading the trial; when the alleged conspiracy is not only for killing the Chief Minister of the State of Gujarat, but also for weighing proxi war against the nation, impact of release of such an accused on the society also needs to be given a due consideration and in these set of facts and circumstances, the trial court was not inclined to invoke its discretion in favour of the petitioner and, therefore, it has rejected the bail application.

I have considered these observations made by the trial court. I have also perused the statement given by Gulalamkhan I. Pathan dated 16th December, 2002. While reading the said statement, it is prima facie involving the petitioner and such involvement is active and clear participation in the conspiracy. Learned advocate MR MH DAYAMAKUMAR for Petitioner has relied upon two decisions referred to above. One is the decision in case of SURESH CHHOTALAL VERMA VESUS STATE OF GUJARAT, reported in 2001 (2) where the question of exercise of the powers under section 319 was examined by this court and it has been

held that for exercising the power under section 319, there must be some evidence before the Court and it is not relating to bail application. Since it is not relating to the bail application, therefore, this judgment is not applicable to the facts and circumstances of the present case.

In case of SN Thapa, Additional Collector, Marine & Preventive, Bombay versus State of Maharashtra, reported in 1994 (2) UJ (SC) 369, the matter was relating to an application for bail but ultimately, the apex court recorded the conclusion that no evidence to prima facie establish limbs of the appellant found and that is how the bail application was granted. If there is no iota of evidence or if no prima facie case is made out by the prosecution against the accused, then only, bail has to be granted but in the facts and circumstances of the instant case, on the basis of the statement dated 16th December, 2002 of Gulalamkhan Pathan, the trial court has found that there is a prima facie case against the petitioner and direct involvement and active participation in the alleged conspiracy has been clearly established against the petitioner and, therefore, this decision cited by the learned advocate MR MH DAYAMAKUMAR for Petitioner is not helpful to the petitioner in view of the facts and circumstances of the case.

The apex court has considered the case of criminal conspiracy in case of State of Maharashtra versus Ramesh Torani reported in AIR 1998 SC 586, the apex court has observed that while considering the bail application in non bailable offence, the court has to consider the nature and gravity of offence. Non disclosure of the name of the applicant as supporter in the remand application cannot be considered tobe a ground for disbelieving the prosecution case. It has also been held that the evidence showing respondent applicant handed over huge amount in contract killers - prima facie case made out against the respondent and, therefore, order granting bail to him pending investigation not proper and the order of the High Court granting bail has, therefore, been set aside by the apex court in the said decision. It is important to be noted that the statement dated 16th December, 2002 given by Gulalamkhan I. Pathan is not the statement of a co-accused. Learned advocate MR MH DAYAMAKUMAR for Petitioner is not disputing this fact. He, however, submits that he was not an eye witness of the incident but this statement is based upon hear say evidence from his brother in law and, therefore, it can also not be considered as extra judicial confession. I have considered these submissions made by

MR MH DAYAMAKUMAR for Petitioner. I have read the statement given by Gulalamkhan Pathan dated 16.12.2002 in detail. Bare perusal of the said statement dated 16.12.2002 is disclosing active role and participation of the present petitioner in the alleged conspiracy, prima facie. Looking to this statement dated 16.12.2002, prima facie active participation and involvement in the alleged conspiracy has been fully established. The petitioner is the one of the persons involved in the alleged conspiracy in view of the said statement dated 16.12.2002. His brother in law Badrealamkhan Pathan is an accused no.11 and, therefore, naturally, because of this relationship, the person who has given the statement dated 16.12.2002 has given it knowing fully well the entire incident and conspiracy between all the accused and, therefore, such statement can be relied upon by the prosecution at the time of consideration of bail application by the court. This aspect has been considered by the apex court in case of Lokeman Shah and another versus State of West Bengal, reported in (2001) 5 SCC 235. In the said case, confessional statement was made by the accused but in the facts of the case, this statement was not made by the co-accused. Before the apex court, the question was raised that the confession can become the basis for conviction even if it is not corroborated. The Hon'ble apex court held that it is not possible to accept the contention that the confession without corroboration cannot be acted on for the purpose of entering a conviction. Confession, if true and reliable, can form the basis for conviction. What is required is the material on which the court can reasonably act for reaching the supposition that certain fact existed; proof of fact depends upon the degree of probability of it having existed. Therefore, considering these principles laid down by the apex court and the statement dated 16th December, 2002 involving the petitioner and establishing his active participation in the alleged conspiracy, I am of the view that the trial court has rightly relied upon the said statement while considering the seriousness of the alleged offence which is against the society as well as the nation. It is also important that the primacy of the interest of the nation and security of the State must be read into every Article dealing with the fundamental rights. This aspect has been examined by the apex court in in case of Chairman, Rly. Board versus Chandrima Das which decision is reported in A.I.R. 2000 SC 988. Recently, in case of Mansab Ali v. Irsan and another, reported in 2002 AIR SCW 5391, the apex court has considered the question of grant of bail and has held that the jurisdiction of the court is discretionary which has to be exercised with great care and caution by

balancing the right of liberty of an individual and interest of the society in general and has also held that the reasons are to be recorded by the court. The apex court has observed that the personal liberty and interest of the society is required to be kept balanced while examining an application for bail. So, personal liberty being the fundamental right of the accused is not the only sole criteria or important but simultaneously interest of the society and nation is also equally important while examining an application for bail. In case of MS Garewal and another versus Deep Chand Sood and Others reported in (2001) 8 SCC 151, the apex court has considered the aspect as to what is the role of the court and law while examining the matter or while deciding any issue. In para 27 and 28 of the said decision, it has been observed by the apex court as under in para 27 and 28 of the judgment:

"27. The decision of this Court in DK Basu v. State of WB comes next. This decision has opened up a new vista in the jurisprudence of the country. The old doctrine of only relegating the aggrieved to the remedies available in civil limits stands extended since Anand, J.) as His Lordship then was) in no uncertain terms observed: (SCC p.439 para 45)

' The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.'

28. Currently judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affection of the people has been taken note of rather

seriously and the judicial concern thus stands on a footing to provide expenditure relief to an individual when needed rather than taking recourse to the old conservative doctrine of the civil court's obligation to award damages. As a matter of fact, the decision in DK Basu has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of 'justice oriented approach'. Law courts will lose their efficacy if they cannot possibly respond to the need of the society - technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

This Court has examined the scope of section 439 of the Code of Criminal Procedure in case of Shri Isaak Ibrahim Sandhi Novda v. State of Gujarat reported in 2000 (3) GLR page 2482. The relevant principles enumerated by this Court (Coram : H.R. Shelat,J.) in para 6, 7 and 9 are reproduced as under:

"6. From the police papers, the learned APP draws my attention to the statement of Kishorsinh Jayavant Jadeja, who is running his STD Booth. What appears from his statement is that the applicant was often going to his Booth for having telephonic talk with the other scamsters involved in the conspiracy. Whatever he was talking on phone was being overheard by this witness. According to this witness, during the talk, the petitioner was inquiring how many fake currency notes and of what denomination were required and how he should supply the same and when, for putting the same into circulation through different persons/agencies. His such statement, at present, is sufficient to prima facie hold that he is involved in the offence alleged. Now, the next question that arises for examination is about other considerations, which guide the Court in the exercise of the discretionary powers. The guiding principles are:

(1) Whether releasing the accused on bail is in any way forbidden by any statutory provision ?

(2) Whether he would intimidate the witnesses or win over them for getting support to

his defence and/or for abstaining from supporting the prosecution?

(3) Whether he would be available easily at the time of his trial and would submit to the custody if convicted and sentenced at last or would flee and would not be available?

(4) Whether he would tamper with the evidence?

(5) Whether he would commit like-wise or any other offence or wrong directly or indirectly remaining behind curtain ?

(6) Whether he would be retributive or revengeful or retaliative, i.e. whether his release will endanger safety of the persons viz. complainant and witness or other concerned or property ?

(7) Whether his own safety is likely to be endangered ?

(8) Whether larger good, national interest, social order, national security, public safety and/or health are likely to be jeopardized ?

(9) The nature and gravity of offence being shocking and alarming or barbaric and day in and day out its effect spreads panic amongst the people or section of the people or damages civilization in the society turning back to jungle law ?

(10) Other peculiar circumstances of each case appearing on record, dictating the exercise of discretion in particular way.

To state in short in different words, is to examine whether accused after being enlarged on bail, is likely to act or behave in a manner injurious to the interest of the prosecution or larger good or national interest misusing the liberty granted. If the answer to any of the above first nine points is in the affirmative, or the consideration of 10th signals premonition or forewarning of any evil or wrong or misfortune and puts the Court at its guard, the bail must ordinarily be refused.

7. The learned Advocate for the applicant has claimed bail on the principle of 'bail and not jail', based on liberty granted under the Constitution. Often in bail matters, the principle is sought to be loosely applied so as to get the bail any how. It is, hence, necessary

to dissipate mistaken impression. No doubt "Bail and not Jail" is the well-cherished principle based on a right to personal liberty not only safeguarded, but put at the highest pedestal also vide Art. 21 of the Constitution of India; and so ordinarily personal liberty is the governing factor in case of bail, but the same cannot be stretched too far or beyond its normal frontiers. It does not and cannot have dominion over larger interest, social order, public safety, public health and of course national interest or security as well or possibility of liberty being abused. The claim of the accused to the larger interest, social order, public safety, public health or the national interest. To put it indifferent words, bail cannot be granted under the guise of liberty, if there is likelihood of accused's subgating larger interest, public safety, social order, or well being and national interest or security or there is possibility of accused's misusing or abusing his liberty after bail. In case of such likelihood, any subtly attempt to get bail under the guise of liberty must be frowned upon and frustrated.

8. xxx xxx xxx

9. One thing cannot be lost the sight of.
The person who has planned for his unlawful enrichment becoming a part of the scam would certainly bide or hover and indulge in that activity either directly or indirectly remaining behind curtain and would not like to give up either because of his helplessness having no other option left or compulsion, or obsessed with wealth prefers to go on with the ploy or scam found to be the hen laying golden eggs without any labour or exertion; but easily and quickly. Even if the strictest conditions are imposed, minute to minute watch on the activities of the accused is not possible, and there is no guarantee that the accused would not again indulge in such activities. Any strict conditions in such cases fall short of and cannot have any deterrent effect. The applicant, who has joining hands with others put the fake currency notes in circulation involved himself in trafficking or possessing fake currency notes, cannot, on the ground of liberty, be released on bail because there is likelihood of his subgating larger interest, social order and national

> economy repeating the same wrong. Mr. S.K.Patel,l earned APP, is also right in submitting that this incident is a part of a conspiracy hatched by the Inter Service Intelligence, the secret service of Pakistan and intention is to destabilize Indian economy. If such applicant is released on bail, the agency at international level, planning to have economic war with India and make India a poor and weak country, will get further chance to fabricate more and more fake notes or get the same from other countries, put into circulation, and foist on people by different devices, the result of which is to make our economy rickety, and the police attempts, to go to the root and burst fake currency notes racket, will fail. In short, when possibility of abusing the liberty granted cannot be ruled out, the applicant, who seems to be the scamster being a part to the organized crime, cannot be released on bail."

In view of these observations and considering the submissions made by the learned advocates for the parties and after perusal of the order passed by the trial court for rejecting the bail application and the statement dated 16th December, 2002 made by the witness who is not a co-accused, I am of the view that the trial court was right in relying upon the said statement and was also right in not exercising the discretion vested in it in favour of the petitioner in view of the prima facie involvement and active participation of the petitioner in the alleged conspiracy as per the statement dated 16.12.2002. In short, when possibility of abusing the liberty granted cannot be ruled out, the petitioner who seems to be scamster, being a part to the organized crime, cannot be released on bail. When possibility of repetition of such wrong cannot be denied, prudence dictates to deny the bail attaching preferential importance to larger good than to the liberty of the petitioner. There is also possibility to take revenge against Gul Alamkhan who is witness, who has given statement on 16.12.2002 which clearly involved the petitioner with active participation in criminal conspiracy against the Nation, State and the Society at large, including the Hon'ble Chief Minister Shri Narendra Modi. Therefore, according to my opinion, the trial court was right in examining the matter at issue and was right in not granting the bail in favour of the petitioner and such person cannot be released on bail when there is conspiracy against the nation and the State

including the Chief Minister of the State of Gujarat. Therefore, according to my opinion, there is no substance in this application and the same is required to be rejected.

Before parting, it is hereby clarified that what observations made in this order have been made only for the purpose of deciding an application of bail and the observations made by this Court are prima facie. Therefore, the trial court, while deciding the matter after regular trial, will decide the matter on the basis of the evidence on record and in accordance with law without being influenced by the observations made by this Court, in any manner whatsoever since they are based on prima facie considerations.

For the reasons recorded above, this petition is rejected.

Dt.23.1.2003. (H.K. Rathod,J.)

Vyas